ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR

KENNETH PALMER, *Complainant,* v. CANADIAN NATIONAL RAILWAY/ ILLINOIS CENTRAL RAILROAD CO. *Respondent.*	ARB Case No. 16-035 ALJ Case No. 2010-FRS-030

BRIEF OF LAW PROFESSORS
ERWIN CHEMERINSKY AND ROBERT F. WILLIAMS,
TOGETHER WITH THE BROTHERHOOD OF MAINTENANCE WAY EMPLOYES — DIVISION OF THE INT'L BROTHERHOOD OF TEAMSTERS ("BMWED")
AS *AMICUS CURIAE*
IN SUPPORT OF THE COMPLAINANT, KENNETH PALMER

NED MILTENBERG
COUNSEL OF RECORD
NATIONAL LEGAL SCHOLARS LAW FIRM, P.C.
5410 Mohican Road — Suite 200
Bethesda, MD 20816-2162
202/656-4490
NedMiltenberg@gmail.com
COUNSEL FOR *AMICI* LAW PROFESSORS

HARRY W. ZANVILLE
HARRY W. ZANVILLE LAW OFFICE
10740 El Marbea Lane
La Mesa, CA 91941
619/400-7164
hwzlaw@gmail.com
COUNSEL FOR *AMICUS* BMWED

August 3, 2016

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amici Erwin Chemerinsky and Robert F. Williams are professors of law. As detailed in attached Appendix A—which provides comprehensive information on the scholarly backgrounds and accomplishments of both *amici*—they have devoted decades to the study, research, and teaching of the constitutional law, legislative law, and statutory construction. *Amici* have no financial stake in the outcome of this case, have not been and will not be compensated for their work on this case, and submit this brief *pro bono publico* in support the Complainant. *Amicus* Brotherhood of Maintenance Way Employes—Division of the International Brotherhood of Teamsters ("BMWED") is the certified labor representative for nearly 35,000 men and women who maintain and repair the nation's railroad tracks, bridges, buildings, and related structures. The BMWED has a substantial interest in this case because: (1) most of its members are employed in safety-sensitive positions and are among the intended beneficiaries of remedial legislation at issue; (2) this case involves the safety of its members, other rail workers, and the public; and (3) the resolution of this case will affect the rights and remedies available to BMWED members.

QUESTIONS PRESENTED

Amici respectfully submit this brief to answer the two questions posed by the Administrative Review Board ("ARB") in its June 17, 2016 Order:

> "1) In deciding, after an evidentiary hearing, if a complainant has proven by a preponderance of the evidence that his protected activity was a "contributing factor" in the adverse action taken against him, is the Administrative Law Judge (ALJ) required to disregard the evidence, if any, the respondent offers to show that the protected activity did not contribute to the adverse action?"
>
> "2) If the ALJ is not required to disregard all such evidence, are there any limitations on the types of evidence that the ALJ may consider?"

INTRODUCTION AND SUMMARY OF ARGUMENT

It is important for the ARB to provide definitive guidance to ALJs and the parties concerning the burden and sequencing of proof in retaliatory employment cases arising under the Wendell H. Ford Aviation Investment & Reform Act for the 21st Century, 49 U.S.C. § 42121, *et seq.*, and the eleven federal statutes modeled upon it (collectively "AIR-21"). Given that conflicting approaches to these issues have roiled the ARB, confounded Article III courts, and been a source of concern to Congress for decades, the ARB's questions suggest that it may desire a fresh approach to considering these issues and may be seeking a strategy more profitable than wading through a thicket of opinions to gauge which ones were more right than not.

Amici believe the best approach is to ask how Congress answered the questions. This approach is appropriate here because the complainant in this case, Mr. Palmer, filed his claim pursuant a federal statute, the Federal Railroad Safety Act of 1970 ("FRSA"), 49 U.S.C. § 20101, *et seq*. The key to gauging how Congress answered the questions, and the goal of any effort at statutory construction is to determine the "'legislat[ure's] intent.'" *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2607 (2012) (quoting *Ayotte v. Planned Parenthood of No. New Eng.*, 546 U.S. 320, 330 (2006) (internal quotation marks omitted)).

Determining Congress' intent in this case, as in any other, is a constitutional command as well as a useful tool because a court must aim to effectuate a legislature's intent even if an accurate determination of that intent yields a result that a judge might regard as unwise, illogical, or even "fundamentally unfair." This is so because "courts have no 'license ... to judge the wisdom, fairness, or logic of legislative choices'" or to "sit as a superlegislature" in cases unrelated to "fundamental rights" or "suspect lines.'" *Heller v. Doe*, 509 U.S. 312, 319 (1993) (quoting *FCC*

v. Beach Communications, Inc., 508 U.S. 307, 313 (1993), and *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976) (*per curiam*)). *See Eldred v. Ashcroft*, 537 U.S. 186, 208 (2003).

The rules for interpreting statutes and deciphering Congressional intent are straightforward. "Applying the ordinary tools of statutory construction, [a] court must determine 'whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter....'" *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1868 (2013) (citation omitted). Importantly, "[i]n answering" the ARB's questions or any similar "inquiry, [courts] must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose.'" *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014) (quoting *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013)). See *Texas Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507, 2518–19 (2015) (courts must assay a "statute's text, history, purpose, and structure.").

Thus, in *amici's* efforts to answer the ARB's questions, we have "appl[ied] the ordinary tools of statutory construction," *Arlington*, 133 S. Ct. at 1868," to the statute's "relevant words" in light of "the statutory context, 'structure, history, and purpose.'" *Abramski*, 134 S. Ct. at 2267.In Section I of this brief, *amici* conclude that AIR-21's plain words manifest Congress' intent to tilt the scales of justice in favor of whistleblowers by carefully rejecting the approach used by the ARB prior to enactment of AIR-21, *i.e.*, the "method" federal courts use in Title VII cases pursuant to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny. AIR-21's bifurcated test creates a "'burden-shifting framework that is ... much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard."" *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015) (quoting *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, at 158-59 (3rd Cir. 2013)). By

contrast, AIR-21 restricts an employer's evidence regarding non-discriminatory reasons for adverse personnel actions to the second phase of an evidentiary hearing and also requires that such evidence satisfy the higher "clear and convincing" standard. '"For employers, this is a tough standard, and not by accident.'" *Araujo*, 708 F.3d at 159 (quoting *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir.1997)).

In Section II, *amici* analyze "the structure and internal logic of the statutory scheme" of AIR-21, *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016), which is critical because "a court's most important 'duty, after all, is 'to construe statutes, not isolated provisions.'" *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citation omitted). The separation and juxtaposition of AIR-21's twin requirements and disparate standards reinforce *amici*'s conclusion that AIR-21 reflects Congress' precise intent to tilt the scales in favor of whistleblowers by disallowing employers to present affirmative evidence during the first, *prima facie* phase of a case. *See Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014).

Section III explains why *amici's* conclusion is consistent with the statute's overall history and its unambiguously remedial purpose. Section IV explains that a contrary view would render AIR-21 subsection (ii) meaningless and unnecessary and thus run afoul of the critical canon against surplusage. Lastly, Section V explains that the AIR-21 framework is not unfair to employers and critiques the railroads' arguments to the contrary.

In the final analysis, *Amici's* application of the ordinary tools of statutory construction to the ARB's two questions yields one conclusion regarding how Congress answered the questions:

> The first stage of a § 20109 case consists solely of the presentation of evidence related to an employee's *prima facie* case. At this stage, an employer's evidence is limited to responding to relevant issues directly raised by an employee's evidence. At this stage, an ALJ may not consider

an employer's evidence of its non-retaliatory reasons for the adverse action if the employee has not opened the door, *i.e.*, has not anticipatorily introduced evidence to rebut the employer's excuses. And, even if the employee does introduce such rebuttal evidence, the employer's evidence at this stage must meet the "clear and convincing"' standard.

ARGUMENT

I. THE PLAIN LANGUAGE OF THE ELEVEN AIR-21 STATUTES MANIFESTS CONGRESS' INTENT TO TILT THE SCALES OF JUSTICE IN FAVOR OF WHISTLEBLOWERS.

"[I]n all statutory construction cases, [courts] begin with the language of the statute." *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). "The first step 'is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.' The inquiry ceases "if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'" *Id.* (citations omitted). Moreover, in all statutory construction cases, courts must "assume that the ordinary meaning of the statutory language accurately expresses the legislative purpose." *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1172 (2013) (internal quotation marks, alliterations, and citations omitted). Simply put, "[i]f the statutory language is plain, we must enforce it according to its terms." *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015) (citation omitted).[1] *See Abramski*, 134 S. Ct. at 2267 (analysis of any statute must begin with its "relevant words.").

Because the complainant filed a claim pursuant to FRSA, the focus of statutory analysis here is on FRSA's anti-retaliation provision, § 20109, which incorporates the two requirements of

[1] Or as Justice Scalia expressed it in his dissent in *King*, "'[T]he plain, obvious, and rational meaning of a statute is always to be preferred ....'" *Id.*, 135 S. Ct. at 2497 (Scalia, J., joined by Thomas & Alito, JJ., dissenting) (citation omitted). As reflected in the fact that Chief Justice Roberts and Justice Scalia cited the same "plain words" canon in *King* (the most recent "Obamacare" case) but ultimately divided sharply over the meaning of the four words in dispute in that case ("established by a State"), jurists often disagree over whether given words are plain.

AIR-21, 49 U.S.C. § 42121 (B), *i.e.*, subsections (i) and (ii):

> **(i) Required showing by complainant**—The Secretary of Labor shall dismiss a complaint filed under this subsection and shall not conduct an investigation otherwise required under subparagraph (A) unless the complainant makes a *prima facie* showing that any behavior described in paragraphs (1) through (4) of subsection (a) was a contributing factor in the unfavorable personnel action alleged in the complaint.
>
> **(ii) Showing by employer**—Notwithstanding a finding by the Secretary that the complainant has made the showing required under clause (i), no investigation otherwise required under subparagraph (A) shall be conducted if the employer demonstrates, by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior.

AIR-21's language and structure creates a bright-line, two-step process.

Subsection (i) plainly requires an employee to "make[ ] a *prima facie* showing" that his protected activity "was a contributing factor in the unfavorable personnel action to alleged in the complaint" to prevent "[t]he Secretary of Labor [from] dismissing [the] complaint." Specifically—and exclusively—the complainant must do nothing less, but also nothing more.[2] An employee's

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[2] The Ninth Circuit explained recently that "[t]o establish a *prima facie* case of retaliation under" the indistinguishable whistleblower provisions of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5801, *et seq.*, "all 'an employee must show [is] that "(1) he engaged in a protected activity; (2) the respondent knew or suspected ... that the employee engaged in the protected activity; (3) [t]he employee suffered an adverse action; and (4) [t]he circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action."'" *Sanders v. Energy Nw.*, 812 F.3d 1193, 1197 (9th Cir. 2016) (internal citation omitted).

The FRSA's "'burden-shifting framework ... is much easier ... than the *McDonnell Douglas* standard,'" *Lee,* 802 F.3d at 631, even though many courts regard the burden under the *McDonnell Douglas* standard to be "'minimal,'" *Buytendorp v. Extendicare Health Servs., Inc.*, 498 F.3d 826, 835 (8th Cir. 2007) (citation omitted), "not onerous," *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). *See Lobato v. N.M. Env't Dep't,* 733 F.3d 1283, 1293 (10th Cir, 2013); *Manning v. Chevron Chem. Co., LLC*, 332 F.3d 874, 883 n. 6 (5th Cir.2003); *In re Henry*, 757 F.3d 1151, 1172 (11th Cir. 2014). "The [ERA] serves a "broad, remedial purpose of protecting workers from retaliation based on their concerns for safety and quality." *Mackowiak v. Univ. Nuclear Sys., Inc.*, 735 F.2d 1159, 1163 (9th Cir.1984). A broad interpretation is "appropriate" because it "promotes the remedial purposes of the statute and avoids the unwitting consequence of preemptive retaliation, which would allow the whistleblowers to be fired ... with impunity for

burden clearly is among the lightest in any civil case, especially in any employment discrimination case. ""Indeed, "the 'burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard....'" *Lee v. Norfolk S. Ry. Co.*, 802 F.3d 626, 631 (4th Cir. 2015) (emphasis added; referring to *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and quoting *Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, at 158–59 (3rd Cir. 2013).[3]

The Third Circuit recently examined the AIR-21 subsection (i), explaining:

> The plaintiff-employee need only show that his protected activity was a "contributing factor" in the retaliatory discharge or discrimination, not the sole or even predominant cause. See 49 U.S.C. § 42121(b)(2)(B)(ii). In other words, "a contributing factor is any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision." *Ameristar Airways, Inc. v. Admin. Rev. Bd.*, 650 F.3d 562, 567 (5th Cir. 2011) (quoting *Allen [v. Admin. Review Bd.,* 514 F.3d 468], *476 n. 3* [(5th Cir. 2008)] (internal quotation omitted)). The term "contributing factor" is a term of art that has been elaborated upon in the context of other whistleblower statutes. The Federal Circuit noted the following in a *Whistleblower Protection Act case:*
>
> > The words "a contributing factor" ... mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant", "motivating", "substantial", or "predominant" factor in a personnel action in order to overturn that action.
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> *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed.Cir.1993) (quoting 135 Cong. Rec. 5033 (1989) (Explanatory Statement on S. 20)) (emphasis added by Federal Circuit). Furthermore, an employee "need not demonstrate the

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internal complaints before they have a chance to bring them before an appropriate agency." *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932–33 (11th Cir.1995).

[3] "A 'minimal evidentiary showing satisfies a plaintiff's burden of production' at the *prima facie* stage" *Kosmicki v. Burlington N. & Santa Fe R. Co.*, 545 F.3d 649, 651 (8th Cir. 2008). *See Woodman v. WWOR-TV, Inc.*, 411 F.3d 69, 76 (2d Cir. 2005) ("*prima facie* burden [i]s 'minimal' and '*de minimis.*'") (citation omitted); *Bridgeport Music, Inc. v. Still N The Water Pub.*, 327 F.3d 472, 480 (6th Cir. 2003); *Barrett v. Lombardi*, 239 F.3d 23, 27 (1st Cir. 2001).

> existence of a retaliatory motive on the part of the employee taking the alleged prohibited personnel action in order to establish that his disclosure was a contributing factor to the personnel action." *Id.*, 2 F.3d at 1141.

Araujo, 708 F.3d at 158-59 (footnote omitted; emphasis added).

In contrast, AIR-21 subsection (ii) defines a significantly greater employer's burden.

> Once the employee [merely] asserts a *prima facie* case, the burden shifts to the employer to demonstrate, "by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of that behavior." 49 U.S.C. § 42121(b)(2)(B)(ii). ... To meet the [clear and convincing] burden, the employer must show that "the truth of its factual contentions are highly probable." *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (internal quotation marks omitted).

Araujo, 708 F.3d at 159 (emphasis added; parallel citations omitted).

Subsection (i) makes no mention of the employer. It does not expressly state, cross-reference, or even imply what evidence an employer may present. To be sure, in *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No.2010-SOX-051 (ARB, Oct. 9, 2014), the majority held that at the "contributory factor" stage, ""an ALJ may consider an employer's evidence challenging whether the complainant's actions were protected or whether the employer's action constituted an adverse action, as well as the credibility of the complainant's causation evidence."). *Fordham,* slip op. at 23. *See id.* at 33, n.84.[4]

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[4] *Fordham* also explained, slip op. at 33, n.84 "[O]ur ruling does not preclude an ALJ's consideration, under the preponderance of the evidence test, of a respondent's evidence directed at three of the four basic elements required to be proven by a whistleblower complainant in order to prevail, *i.e.* whether the complainant engaged in protected activity, whether the employer knew that complainant engaged in the protected activity, and whether the complainant suffered an unfavorable personnel action. .... It is only with regard to the fourth element, of whether the complainant's protected activity was a contributing factor in the unfavorable action, that the statutory distinction is drawn. ... [I]n determining whether a complainant has met his or her burden of demonstrating a "contributing factor" causal relationship between the protected activity and the adverse personnel action, an employer's evidence supporting its affirmative defense of a legitimate, non-retaliatory reason for its action is not weighed against the complainant's causation

In sum, AIR-21's words reveal Congress' manifest intent that an employers' evidence plays only the slightest role in an ALJ's assessment of whether an employee has "ma[de] a *prima facie* showing" that his or her protected activity "was a contributing factor in the unfavorable personnel action alleged in the complaint." *Id.*

II. THE "STRUCTURE AND INTERNAL LOGIC" OF ALL ELEVEN AIR-21 STATUTES FURTHER MANIFESTS CONGRESS' INTENT TO TILT THE SCALES OF JUSTICE IN FAVOR OF EMPLOYEES BY INCREASING AN EMPLOYER'S BURDEN OF PROOF AND SHIFTING THE TIMING OF THE INTRODUCTION OF AN EMPLOYER'S EVIDENCE

Plain words plainly control. Nonetheless, "'oftentimes the "meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.'" *King*, 135 S. Ct. at 2489 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)).[5] Consequently, "when deciding whether the language [in contention] is plain, [courts] must read the words "in their context and with a view to their place in the overall statutory scheme." *King*, 135 S. Ct. at 2489 (quoting *Brown & Williamson*, 529 U.S. at 133 (internal quotation marks omitted)). *See Util. Air Reg. Grp. v. E.P.A.*, 134 S. Ct. 2427 (2014).

It is crucial to heed the separation and juxtaposition of distinct statutory provisions and how each one fits within "the structure and internal logic of the statutory scheme." *Lockhart v. United States*, 136 S. Ct. 958, 962 (2016) (emphasis added). *See Maracich,* 133 S. Ct. at 2209. The reason why is it is essential to read a provision's words "in their context and with a view to their place in the overall statutory scheme," *King*, 135 S. Ct. at 2489, is because "a court's most

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evidence, given that the statutory affirmative defense of a legitimate, non-retaliatory ... reason for its action had there been no protected activity must be proven by "clear and convincing evidence."

[5] *See Jones v. United States*, 527 U.S. 373, 388-89 (1999) (opinion for the Court by Thomas, J.); *Yates v. United States*, 135 S. Ct. 1074, 1092 (2015) (Kagan, J., joined by Scalia, Kennedy, & Thomas, JJ., dissenting); *Gustafson*, 513 U.S. at 575; *Davis v. Dep't. of Treas.* 489 U.S. 803, 809 (1989); *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961).

important duty, after all, is 'to construe statutes, not isolated provisions.'" *Id.* at 2489 (citation omitted). *See Graham Cty. Soil & Water Conserv. Dist. v. U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010); *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995).

A corollary canon is especially apt here. Thus, the Supreme Court has stressed that it "ha[s] often noted that when 'Congress includes particular language in one section of a statute but omits it in another'—let alone in the very next provision—this Court 'presume[s]' that Congress intended a difference in meaning." *Loughrin v. United States*, 134 S. Ct. 2384, 2390 (2014) (emphasis added; citations and footnote omitted). "[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of words in related—particularly adjacent—statutory provisions. *Russello v. United States*, 464 U.S. 16, 23 (1983). *See Corley v. United States*, 556 U.S. 303, 314-16 (2009); *Negusie v. Holder*, 555 U.S. 511, 544-45 (2009).

Here, AIR-21's "structure and internal logic," *Lockhart*, 136 S. Ct. 958 at 962, reflect and reinforce the words of all eleven of these virtually identical statutes, including the FRSA. The first part of the AIR-21 test, and the first subsection of the relevant statutory provision, 49 U.S.C. § 42121 (B)(i), prescribe a clearly circumscribed role for an employee: all a complainant needs to do is to "make[ ] a *prima facie* showing that any [protected] behavior ... was a contributing factor in the unfavorable personnel action alleged in the complaint." The second part of the AIR-21 test, and the second subsection of the relevant statutory provision, 49 U.S.C. § 42121 (B)(ii), prescribes a clearly circumscribed role for the employee: to "demonstrate[ ], by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence" of the employee's protected activities.

The *Fordham* dissent argued "fundamental fairness" requires that an employer be given a

full opportunity to defend itself as early and as often as possible and be allowed to present legitimate, business reasons for its actions during the same AIR-21 subsection (i) stage as a whistleblower. *Fordham v. Fannie Mae*, ARB No. 12-061, ALJ No. 2010-SOX-051 (ARB, Oct. 9, 2014), slip op. at 36 (Corchado, J., dissenting). That dissent further asserted that an ALJ must weigh an employer's evidence on the same scales and according to the same low, preponderance standard an ALJ uses in weighing the strength of a whistleblower's *prima facie* case.

There is nothing inherently wrong about these propositions—if applied in employment discrimination cases brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2, *et seq*.[6] But Title VII cases are utterly irrelevant in cases arising under AIR-21 statutes. Worse yet, those urging the propriety of applying Title VII law and procedure, driven by *McDonnell Douglas* and its progeny, to AIR-21 cases, are essentially demanding that the ARB ignore Congress' decision to reject *McDonnell Douglas* in cases involving the protection from retaliation against transportation and nuclear workers who are employed in highly safety sensitive positions.

The simple rejoinder to the dissent's argument that the *status quo* is "unfair" to employers is " Congress ... wr[o]te the statute that way." *Corley*, 556 U.S. at 315 (quoting *Russello,* 464 U.S. at 23). *See United States v. Naftalin*, 441 U.S. 768, 773 (1979). The *Russello-Loughrin* interpretive canon—that Congress acts intentionally when it omits language included elsewhere—applies with particular force here. As shown above, Congress evidenced its ability to both specifically include a "clear and convincing" requirement in one subsection of the statute, *i.e.,* in AIR-21 subsection

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[6] As discussed below, the Circuit Courts of Appeals are split on this exact issue; panels in at least three Circuits approved this everything-comes-in-at-the-*prima-facie*-stage formula as "[t]he *prima facie* case method established in *McDonnell Douglas" Corp. v. Green*, 411 U.S. 792 (1973), for use in Title VII cases. *U.S.P.S. v. Aikens*, 460 U.S. 711, 715 (1983).

(ii), and explicitly exclude a "clear and convincing" "require[ment]" in the statute's only other relevant provision. If Congress wished the "clear and convincing" test to be applied to all parties and at all stages of an evidentiary hearing, it knew how to draft accordingly. It did not. And that omission is fatal to the dissent's argument.

Dep't of Treasury, IRS v. FLRA, 494 U.S. 922 (1990), well illustrates how the Supreme Court employs this canon. There, the Government argued that the word "laws" in one section of a statute meant the same thing as the phrase "law, rule, or regulation" in another section. *Id.*, at 931. The Court rejected that argument as "simply contrary to any reasonable interpretation of the text." *Id.*, at 932. The Court held that a statute that referred to "laws" in one section and "law, rule, or regulation" in another "cannot, unless [a court] abandons all pretense at precise communication, be deemed to mean the same thing in both places." *Id.* That inference is even more compelling here, because AIR-21 expressly refers to "requires" and "requirement" in adjacent subsections, rather than several sections apart. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919-20 (2015); *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2131 (2013).

In sum, if there is any ambiguity in the specific words Congress chose, or any uncertainty about their import and significance, viewing those words and subsections through the lens of the *Russello-Loughrin* canon makes clear that Congress intended that under AIR-21's bifurcated scheme different standards of proof apply to employers in whistleblower cases..[7] One other thing is clear: the ARB is bound by that intent.

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[7] For proper use of these canons to FRSA's anti-retaliation sections, see *Reed v. Norfolk So. Ry. Co.*, 740 F.3d 420 (7th Cir. 2014); *Norfolk So. Ry. Co. v. Perez*, 778 F.3d 507 (6th Cir. 2015).

III. THE HISTORY AND REMEDIAL PURPOSE OF ALL ELEVEN AIR-21 STATUTES FURTHER MANIFEST CONGRESS' INTENT TO TILT THE SCALES OF JUSTICE IN FAVOR OF EMPLOYEES BY AMPLIFYING AN EMPLOYER'S BURDEN OF PROOF AND SHIFTING THE TIMING OF THE INTRODUCTION OF AN EMPLOYER'S EVIDENCE

The Supreme Court emphasizes that courts must not "'interpret [a statute's] relevant words ... in a vacuum, but with reference to the statutory context, structure, history, and purpose.'" *Abramski,* 134 S. Ct. at 2267 (2014) (quoting *Maracich,* 133 S. Ct. at 2209).[8] Importantly, because a court's "duty ... is 'to construe statutes, not isolated provisions,'" *King*, 135 S. Ct. at 2489, *see Gustafson,* 513 U.S. at 568, the ARB must determine if the statute is remedial in nature and, if so, to "'construe[ ] [it] 'not technically and restrictively, but flexibly to effectuate its remedial purposes.'" *S.E.C. v. Zandford,* 535 U.S. 813, 819 (2002) (citations omitted). *See Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); *Atlas Sounding Co. v Townsend*, 557 U.S. 404, 417 (2009).

This canon is particularly pertinent here: judicial forums from the Supreme Court to the ARB invariably recognize whistleblower statutes as being remedial. The FRSA is a remedial statute. *United States v Missouri P.R. Co.*, 553 F.2d 1156 (8th Cir. 1977). The ARB holds without exception that the AIR-21 statutes are remedial.[9] See *Lawson v. FMR LLC*, 134 S. Ct. 1158, 1165-76 (2014) (whistleblower protection in the Sarbanes-Oxley "(SOX") Act should be broadly construed to cover more employees, not fewer ones).

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[8] "When it comes to discerning and applying [legal] standards, in this area as others, 'a page of history is worth a volume of logic.'" *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 395 (2006) (Roberts, C.J., joined by Scalia & Ginsburg, JJ., concurring) (quoting *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (opinion for the Court by Holmes, J.)).

[9] *See Wallum v. Bell Helicopter Textron, Inc.*, ARB Case No. 09-081, 2011 WL 4915755, at *2 (Sept. 2, 2011) ("whistleblower statutes, AIR 21 included, ... are remedial statutes that aim to protect individual whistleblowers from employer retaliation."); *Spinner v. Landau & Assoc., LLP*, ARB Case Nos. 10-111, 10-115, 2012 WL 1999677, at *11 (May 31, 2012).

As such, in construing the FRSA, all "legal ambiguities are resolved to the benefit" of those Congress intended to advantage. *Andrus v. Glover Const. Co.*, 446 U.S. 608, 619 (1980). *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 345-46 (1997); *Brown v. Gardner*, 513 U.S. 115, 117–18 (1994). The history of the FRSA, in general, and the history of Congress' 2007 amendment to the FRSA to incorporate AIR-21, in particular, reveal that the 2007 amendment had three "purpose[s]": (1) to provide courts with a simplified two-step, bright-line test to use in determining whether an employee's protected activities were a "contributing factor" in an employer's "unfavorable personnel action" against the employee; (2) to make it easier for employees to "make a *prima facie*" showing" of unlawful retaliation by eliminating the need for an employee to ever prove the employer had an invidious motive and by eliminating the need for an employee to disprove an employer's pretext as part of the employee's *prima facie* case; and (3) to make it far harder for an employer to prevail by requiring it to "demonstrate[ ], by clear and convincing evidence, that the employer would have taken the same unfavorable personnel action in the absence of [the employees' protected] behavior."

When Congress amended the FRSA in 2007-08 it knew that railroad whistleblowers already had a statutory remedy for retaliation, and that courts were using a three-step burden-shifting scheme—established for Title VII cases in *McDonnell Douglas*—for evaluating their claims.[10] Although in 1981 the Supreme Court described a Title VII plaintiff's burden under

[10] *McDonnell Douglas* created a three-step "method": "a plaintiff must first establish a *prima facie* case of discrimination. The burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment action. If the employer meets this burden, the presumption of intentional discrimination disappears, but the plaintiff can still prove disparate treatment by, for instance, offering evidence demonstrating that the employer's explanation is pretextual." *Raytheon Co. v. Hernandez,* 540 U.S. 44, 49 n. 3 (2003) (citations omitted).

McDonnell Douglas as "not onerous," *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981), by 2007 Congress had concluded that the *McDonnell Douglas* scheme actually was too onerous for whistleblower claimants, not least because all of the evidence in Title VII cases often is judged at the same time and weighed on the same preponderance-of-the-evidence scale. Moreover, although in 1983 the Supreme Court said "[t]he *prima facie* case method established in *McDonnell Douglas* was 'never intended to be rigid, mechanized, or ritualistic,'" *U.S.P.S. v. Aikens*, 460 U.S. 711, 715 (1983), by 2007 Congress concluded that *McDonnell Douglas*' lack of "rigid[ity]," *id.,* was a vice, not a virtue, in whistleblower cases, as that flexible "method" provided insufficient guidance to ALJs who deal with a very large number of cases.

Thus, for whistleblower cases, Congress replaced *McDonnell Douglas'* non-"rigid," non-"mechanized" "method" with a bright-line test—a precisely choreographed two-step-test. This bifurcated framework is two tests in one, a framework where each party has disparate burdens and must satisfy them at different stages, and a framework in which each party's proof is tested on a very different scale. Most important, an employer's burden is much greater than under *McDonnell Douglas.*[11] The AIR-21 burden-shifting framework that is applicable to FRSA cases is "much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard, while [f]or employers, this is a tough standard, and not by accident. ... [It] is tough because Congress intended for companies in the nuclear industry to face a difficult time defending themselves, due to a history of whistleblower harassment and retaliation." *Araujo,* 708 F.3d at 159 (emphasis added; citations

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[11] Under *McDonnell Douglas*, all an employer must do to meet its burden of production is "to introduce evidence which, ***taken as true***, would ***permit*** the conclusion that there was a nondiscriminatory reason for the adverse action." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 509 (1993) (emphasis in the original), "'The defendant need not persuade the court that it was actually motivated by the proffered reasons.'" *Id.* at 510 (citation omitted).

omitted).

Congress' decision to reject the non-"rigid" *McDonnell Douglas* "method" was both deliberate and understandable: that prior method not only made it very difficult for a whistleblower to obtain vindication through the courts but it also bred confusion and inconsistent results in Title VII and whistleblower cases.[12] Indeed, it breeds confusion still.

The history of railroad safety and whistleblower legislation reflects Congress' longstanding goals to protect the health and safety of rail workers and to protect whistleblowers by increasing the scope of their protections and making it easier prove their case.

It is essential to understand that Congress increasingly has tilted the scales of justice in favor of whistleblowers, in general, and rail workers, in particular. This tilt is not an unintended mistake that the ARB needs to (or has the authority) to fix, but rather is the deliberate result of Congress' century-long efforts to safeguard the health and safety of rail workers and the public. The ARB should recognize and apply those scales according to Congress' manifest plans, rather than tinkering with them to fit into the dissent's preferred common law model of litigation. Nor should the ARB succumb to the railroads' ahistorical and self-serving reading of the operative statutes, or to attempt to satisfy a Platonic ideal of "fundamental fairness." Rewriting the statute according to ahistorical ideals of "fundamental fairness" is not a faithful exercise of statutory

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[12] Whatever the virtues of the *McDonnell Douglas* "method" in Title VII cases, Congress concluded that it was too onerous for whistleblowers. "Congress" therefore "intended that ERA's 'contributing factor' standard provide complainants a lower hurdle to clear than the bar set by other employment statutes," *i.e.*, in Title VII cases." *Addis v. Dep't of Labor*, 575 F.3d 688, 690-91 (7th Cir. 2009) (emphasis added; citing *Williams v. ARB,* 376 F.3d 471, 476 (5th Cir. 2004); *Trimmer v. Dep't of Labor,* 174 F.3d 1098, 1101 (10th Cir.1999); *Frobose v. Am. Sav. & Loan Ass'n,* 152 F.3d 602, 612 (7th Cir.1998)). "In particular, the ERA framework is intended to replace the traditional *McDonnell Douglas* formulation ...." *Addis*, 575 F.3d at 690 (emphasis added; citing *Stone & Webster Eng'g Corp. v. Herman,* 115 F.3d 1568, 1572 (11th Cir. 1997)).

interpretation. Rather, it would be an illegitimate exercise in judicial legislation. *See* discussion of *Heller v. Doe, supra.*

Five years ago, the Supreme Court explained one of the basic reasons for Congress' tilt, noting that "[t]he railroad business" has always been "exceptionally hazardous" even from ""the dawn of the twentieth century." *CSX Transp., Inc. v. McBride*, 564 U.S. 685, 691 (2011). The "'dangers of railroading ... resulted in the death or maiming of thousands of workers every year,' including 281,645 casualties in the year 1908 alone." *Id.* (quoting *Consolidated Rail Corp. v. Gottshall,* 512 U.S. 532, 542 (1994) and citing S. Rep. No. 61–432, p. 2 (1910)).

Since 1908, Congress has tried three different ways to staunch this flow of blood: (1) initially, through a compensatory system that aimed to deter injury-causing activities by railroads by compelling them to internalize the costs of those injuries; (2) subsequently, through direct regulation of rail operations; and (3) ultimately, by protecting rail workers who disclose railroad activities that endanger their own health and safety or that of the public at large, *i.e.*, by federalizing whistleblowing and incentivizing whistleblowers to serve as private attorneys-general, just as in cases filed under the False Claims Act, 31 U.S.C. § 3729, *et seq. See U.S. ex rel. Branch Consultants v. Allstate Ins. Co.*, 560 F.3d 371, 376 (5th Cir. 2009); *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 970 (6th Cir. 2005).

The first, a compensatory/deterrent approach, is exemplified by the Federal Employers' Liability Act of 1908 ("FELA"), 45 U.S.C. § 51, *et seq.*, which was enacted to "'shif[t] part of the human overhead of doing business from employees to their employers.'" *Id.* (quoting *Gottshall,* 512 U.S., at 542 (internal quotation marks omitted)).[13] Congress broadened the scope of this

[13] FELA "was enacted because the Congress was dissatisfied with the common-law duty of the

remedial statute several times in the last 110 years, each time tilting the scales to make it easier for rail workers to obtain compensation for on-the-job injuries.[14]

The second, a regulatory approach, is exemplified by Congress' creation of two agencies. OSHA was created to enforce the Occupational Safety and Health ("OSH") Act of 1970 29 U.S.C. § 651, *et seq.*, while the Federal Railroad Administration ("FRA") was created to enforce the FRSA.[15] Congress found, that the FRA was ineffective in protecting whistleblowing rail workers,[16]

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master to his servant. [FELA] supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death that is the subject of the suit. The burden of the employee is met when there is proof, even though entirely circumstantial, from which the jury may with reason make that inference." *Rogers v. Missouri Pac. R. Co.*, 352 U.S. 500, 507-08 (1957) (emphasis added). "Given the breadth of ... Congress' ... remedial goal[s]," especially compared to "tort litigation at common law, 'a relaxed standard of causation applies under FELA.'" *CSX,* 564 U.S. at 691-92 (emphasis added; citations omitted).

[14] In 1939, for example, Congress amended FELA to "proscribe, in no uncertain terms, judicial invocation of the assumption of risk defense and to eliminate other 'fetters' to recovery imposed by federal courts implementing the initial 1908 legislation." *Harrington v. Atl. Sounding Co.*, 602 F.3d 113, 137 n.11 (2d Cir. 2010) (citing *Rogers*, 352 U.S. at 508-09).

[15] The FRSA's stated purpose is to "'promote safety in every area of railroad operations and reduce railroad-related accidents and incidents" by, *inter alia,* "prescrib[ing] regulations ... for every area of railroad safety.'" *Cowden v. BNSF Ry. Co.*, 690 F.3d 884, 890 (8th Cir. 2012) (citations omitted).

[16] The Dep't of Transportation's Inspector General found an "11% increase in grade crossing fatalities" from 2003 to 2004, largely because the FRA "investigated very few grade crossing collisions—only 9 of the 3,045 collisions that occurred in 2004," "investigated less than two tenths of one percent of all accidents and incidents involving railroads," and "recommended only 347 violations for the 7,490 critical safety defects it identified for grade crossing signals." DOT IG, *Audit of Oversight of Highway-Rail Grade Crossing Accident Reporting, Investigations, and Safety Regulations*, at pp. 2, 5, 7-8 (Nov. 28, 2005) (emphasis added) (avail. 073116 at https://www.oig.dot.gov/sites/default/files/mh2006016.pdf).

Although the FRA ordered railroads to adopt, through 49 C.F.R. § 225.33(1), "Internal Control Plans ("ICPs") to discourage the "harassment or intimidation of any person ... from reporting [an] accident, incident, injury or illness," it never enforced these anti-retaliatory requirements. 49 C.F.R. § 209.303(c) also authorizes the FRA to disqualify railroad managers from working

and it transferred enforcement of the anti-retaliation laws from FRA to OSHA. See Implementing Recommendations of the 9/11 Commission Act of 2007, P.L. 110-53, and Railroad Safety Improvement Act of 2008, 49 U.S.C. § 10101, *et seq.*

The third and most pertinent approach has been Congress' repeated efforts to enable employees to blow the whistle on employer actions that threaten their health and safety, or that of the public, and to protect and thereby encourage whistleblowing through statutes that made it ever easier for workers to speak out without fear of "adverse personnel actions."

Congress has expanded the scope and number of protected of whistleblowing workers since 1778, each time expressly intending to make it easier for whistleblowers to prove their case.[17] The first modern whistleblower statutory provision for employees that prohibited employers from, "in any manner, discriminat[ing] against any employee because such employee" complained about safety is § 660(c)(1) of the OSH Act of 1970. Lax enforcement rendered it largely ineffective.[18]

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anywhere in the railroad industry if they "harass or intimidat[e]" whistleblowers. Notably, however, the FRA never has used § 209.303 to address retaliatory conduct. *E.g.*, GAO, *Internal Control Weaknesses in FRA's Civil Penalty Program,* RCED-91-47, Dec. 26, 1990; *FRA Report on CSX Transp. Harassment and Intimidation Investigation*, p. 4 (Oct. 17, 2007); *FRA Notice of Interpretation*, 74 FR 14091 (March 30, 2008); FRA, *Misc. Amendments to the [FRA's] Accident/Incident Reporting Requirements*, 75 FR 68862 (Nov. 9, 2010).

[17] In 1778, the Continental Congress began the American tradition of protection of whistleblowers in response to retaliation against sailors by a superior U.S. Navy officer. *Journals of the Continental Congress: 1774-1789* (GPO, 1908) pp. 732-33. During the Civil War, Congress enacted the False Claims Act, 31 U.S.C. § 3729, to deter retaliation against whistleblowers. *Vermont Agency of Nat. Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 774 (2000).

[18] By 1997, the Dep't of Labor's IG lamented: "Workers who complain about workplace safety/health hazards are frequently the targets of reprisals by their employers. Particularly vulnerable were workers who brought complaints to the employers rather than to OSHA." DOL/OIG, *Nationwide Audit of OSHA's Section 11(c) Discrimination Investigations* 4 (March 31, 1997) (avail. 072616 at https://www.oig.dol.gov/public/reports/oa/pre_1998/05-97-107-10-105.pdf). Of the 51% of employees "who complained to the employers rather than to OSHA to correct the alleged safety hazard ... [n]early 82%" were fired. *Id.* at 6. Complaining to OSHA improved the odds of keeping one's job, but not much; "51%" of those workers still were fired.

Although Congress enacted ten more whistleblower protection statutes in the following decade, *see* Appendix B, each shared the OSH Act's weaknesses, particularly the requirement that an employee needed to prove that employer hostility related to the employee's protected activity was the "sole" motivating factor for the employer's decision to take retaliate through an adverse employment action.

Congress tried again ten years later, this time by enacting the Federal Railroad Safety Authorization Act of 1980, , 45 U.S.C. § 441, *et seq.,* created a cause of action for rail employees to protect themselves from employer retaliation for having made safety-related complaints and, by encouraging workers to blow the whistle on safety violations to protect the public at large.[19] FRSA § 20109(a) proved toothless, though, chiefly because it provided only scant relief, *e.g.*, of only back-pay and reinstatement.[20]

Congress, after having extended whistle-blower protection to nuclear power industry employees through enactment of the Energy Reorganization Act of 1974 ("ERA"), 42 U.S.C. § 5801, *et seq.,* was dismayed to find in 1989 that federal court and enforcement agency

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Id. As the IG delicately phrased it, OSHA's lackluster "operating practices"—including tardiness in processing claims and over-eagerness to settle them quickly and cheaply—"present[ed] obstacles to gaining all appropriate relief for complainants with merit cases." *Id.* at 11.

[19] "Congress designed § 20109 to protect employees who report safety violations for the purpose of promoting railroad safety. The FRSA recognizes that ... railroad employees play a vital role in accomplishing the safety goals embodied in the Act. Often, a railroad employee may be the only person who has knowledge of a major safety violation" and is "the last line of defense before the occurrence of a tragic accident." *Kelley v. Norfolk & Southern Ry.*, 80 F. Supp. 2d 587, 591 (S.D. W. Va. 1999) (emphasis added).

[20] Only seven § 20109 reported cases were filed between 1980-2007. Six were dismissed on procedural grounds, while only marginal relief was obtained in the remaining case, *Cusack v. Econo-Rail Corp & Sabine Contr. Corp.*, Award 25000 (Div. 1, NRAB, 1999), aff'd, *Cusack v. Trans-Global Solutions*, 222 F. Supp. 2d 834, 842 (S.D. Tex. 2002).

misinterpretations of the ERA were hampering the effectiveness of its protective scheme.[21] [22]Overwhelming majorities of a Republican-controlled Congress amended the ERA in 1992 and 1994 to ensure compliance with Congress' goal of protecting whistleblowers. Congress intended these amendments "to make it easier for whistleblowers to prevail in their discrimination suits," *Trimmer v. United States*, 174 F.3d 1098, 1101 (10th Cir. 1999). Congress "ma[d]e it easier by rejecting *McDonnell Douglas'* three-step burden-shifting scheme and replacing it with a two-step burden-shifting framework which allows employees to prove their case by showing retaliation

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[21] As Cong. Pat Schroeder explained Congress' exasperation: "We have had the whistleblower protection statute on the books since 1978, and there is absolutely no question that it did not work." *Explanatory Statement on Senate Amendment—S. 20*, House of Representatives, Tues., March 21, 1989, 101st Congress, 1st Sess., Vol. 135, No. 32, 135 Cong. Rec. on H.B. 740, *Whistleblower Protection Act of* 1989, at p. 38. Cong. Steny Hoyer agreed: "Since Congress enacted the Civil Service Reform Act in 1978, the intent of the Congress has not been fulfilled. The Office of Special Counsel [("OSC")] ... and the [MSPB], charged with hearing and adjudicating cases have not been effective. In a study conducted by the GAO, there were over 400 whistleblower cases in a 2-year period, resulting only in the cancellation of transfers for three individuals. In fact, in the 8-year history of the OSC, they have not taken any corrective action or disciplinary action in 99 percent of their whistleblower cases. ... To date there has not been one case documented by a GAO study which saved or recovered the job of a single whistleblower." *Id.* at pp. 42-43.

[22] The ARB should not overlook a final important contextual fact about the FRSA amendments; they came fast on the heels of *Lundeen v. Canadian Pac. Ry. Co.*, 447 F.3d 606, 611 (8th Cir. 2006), *vacated*, 532 F.3d 682 (8th Cir. 2008). "To say that Congress acted quickly in response to these decisions would be an understatement." F. Mastro, *Preemption is Not Dead*, 37 TRANSP. L. J. 1, 12 (2010). Rep. James Oberstar, Chair of the House Transportation and Infrastructure Committee, was incensed by *Lundeen's* interpretation of the FRSA, one which converted its anti-preemption clause into a vehicle to preempt state tort damages claims arising from catastrophic railroad accidents. Oberstar, castigating the *Lundeen* court for figuratively declaring white was black, led the charge to correct the result with the FRSA amendments. *See* 153 Cong. Rec. H8496-01, H8589 (daily ed. July 25, 2007).

As a result,, Congress, determined to avoid another *Lundeen*, wrote the FRSA amendments with particular care. *See, e.g.*, § 20109(f) and (g). in § 20109(c)(1). Thus, the context of the § 20109 amendments in 2007-08 is that after *Lundeen*, a case that Congress considered a debacle of federal court interpretation, it drafted the FRSA amendments with unusual care and with the specific goal of limiting federal courts' ability to interpret them incorrectly. The ARB should spurn the railroads' invitation to follow the *Lundeen* model.

against their "protected action" was merely "a contributing factor in the unfavorable personnel action," and not the sole factor in such action. *Id.* 42 U.S.C. § 5851(a).

As *Araujo* explained, Congress' decision to reject the *McDonnell Douglas* method and to replace it with AIR-21 was deliberate; it was intended to make whistleblower cases "much easier" for employees and much "'tough[er]'" for employers. 708 F.3d at 159 (citation omitted). This marked yet another effort by Congress to put its thumb on the employees' side of the scale.

> It is worth emphasizing that the AIR–21 burden-shifting framework that is applicable to FRSA cases is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard. As the Eleventh Circuit noted in a case under the Energy Reorganization Act, 42 U.S.C. § 5851, a statute that uses a similar burden-shifting framework, "[f]or employers, this is a tough standard, and not by accident." *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1572 (11th Cir.1997). The Eleventh Circuit stated that the standard is "tough" because Congress intended for companies in the nuclear industry to "face a difficult time defending themselves," due to a history of whistleblower harassment and retaliation in the industry. *Id.* The 2007 FRSA amendments must be similarly construed, due to the history surrounding their enactment. ... [F]or example, that the House Committee on Transportation and Infrastructure held a hearing to "examine allegations ... suggesting that railroad safety management programs sometimes either subtly or overtly intimidate employees from reporting on-the-job-injuries." (*Impact of Railroad Injury, Accident, and Discipline Policies on the Safety of America's Railroads*: Hearings Before the H. Comm. on Trans. and Infrastructure, 110th Cong. (Oct. 22, 2007)).

Araujo, 708 F.3d at 159 (emphasis added).[23]

Accordingly, it would be manifestly contrary to Congress' lawful and carefully considered choice for the ARB to use a mere "interpretation" to re-insert the *McDonnell Douglas* method—

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[23] *Araujo* explained: "As the Majority Staff of the Committee on Transportation and Infrastructure noted to ... Committee: 'The accuracy of rail safety databases has been heavily criticized in a number of government reports over the years.' The primary issue ... is that the rail industry has a long history of underreporting incidents and accidents" and "railroad [unions] have frequently complained that harassment of employees who reported injuries is a common railroad management practice.'" 708 F.3d at 159 (internal citation omitted).

the method Congress deliberately spurned—back into the AIR-21 scheme in order to balancing the scales of justice in the name of "fundamental fairness.[24]

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[24] Congress had good reason to be frustrated with the *McDonnell Douglas* "method." Although that scheme appears simple, at least in the abstract, it has proved to be considerably more complex and less manageable in practice. *See Aikens*, 460 U.S. at 715. Like Congress, courts and commentators expressed frustration about the confusion it generates. *See, e.g., Marshall v. Goodyear Tire & Rubber Co.*, 554 F.2d 730, 735 (5th Cir. 1997) ("Considerable confusion" about "*prima facie* case."); *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 813 (6th Cir. 2011) (same).

The Circuit Courts are split over its application. For example, a recent Tenth Circuit panel faulted a district court's reliance on a defendant's "evidence as a means to undermine [a plaintiff's] *prima facie* case of age discrimination," reasoning that allowing such evidence to be used at the *prima facie* stage "'raises serious problems under the *McDonnell Douglas* analysis," explaining that "[s]hort-circuiting the analysis at the *prima facie* stage frustrates a plaintiff's ability to establish that the defendant's proffered reasons were pretextual and/or that age was the determining factor' for discharge." *Ellison v. Sandia Nat'l. Labs.*, 60 F. App'x 203, 205, 2003 WL 714849, at *2 (10th Cir. 2003 (emphasis added; citation). The Sixth Circuit faulted the *McDonnell Douglas* test itself. "[W]hile the burden-shifting analysis of *McDonnell Douglas* was created to assist in the presentation of a discrimination case, it often fails to fulfill its purpose. ... 'One common misapplication is the tendency to push all of the evidence into the *prima facie* stage and ignore the purpose for and application of the three stages. Such was the problem here, where the district court merged its analysis of the second (+nondiscriminatory justification) and third (pretext) stages of the *McDonnell Douglas* test into its evaluation of [the plaintiff's] *prima facie* case." *Provenzano,* 663 F.3d at 813 (emphasis added; footnote and citations omitted). This confusion arises from, and is reflected in—as in feedback loop—the lower "courts' misapplication of the *McDonnell Douglas* analysis by conflating its necessarily distinct first step—employee's *prima facie* discrimination claim—and second step—employer's legitimate, non-discriminatory reason—all the while eliminating the necessary final step—employee's opportunity to prove that the employer's alleged reason is pretext." J. Bergin, *"Ability" Means Ability,* 36 WOMEN'S RTS. L. REP. 36, 50 (2014). *See* E. Mertz, *The Burden of Proof*, 82 Nw. U. L. Rev. 492, 496–97 (1988); D. Berry, *The Changing Face of Disparate Impact Analysis*, 125 MIL. L. REV. 1, 7 (1989).

Yet other federal appellate courts have held there is "no impermeable barrier that prevents the employer's use" of evidence regarding its non-discriminatory reasons for the its action at all "different stages of the *McDonnell Douglas* framework." *Warch v. Ohio Cas. Ins. Co.*, 435 F.3d 510, 515 (4th Cir 2006), and that "[i]n determining whether a *prima facie* case was established under Title VII, the judge's duty was to weigh and evaluate all of the evidence before him." *Kitchen v. Chippewa Valley Sch.*, 825 F.2d 1004, 1014 (6th Cir. 1987). *See MacDonald v. E. Wyoming Mental Health Ctr.*, 941 F.2d 1115, 1121 (10th Cir. 1991).

IV. BECAUSE SUBSECTION (ii) IS INTEGRAL TO AIR-21, THE CANON OF SURPLUSAGE COUNSELS AGAINST ANY INTERPRETATION THAT WOULD RENDER IT MEANINGLESS

Among the "most basic of interpretative canons," is the maxim that "[a] statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley,* 556 U.S. at 314 (internal quotation marks and citations omitted). Notably, "the canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme." *Marx*, 133 S. Ct. at 1178 (internal quotation marks and citations omitted). Courts must be especially "'hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.'" *Id.* (quoting *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 185 (2011)). *See Hibbs v. Winn*, 542 U.S. 88, 101 (2004); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Any interpretation of AIR-21 that would allow an employer to present its ostensibly legitimate reasons for its actions during the subsection (i) phase of a case would render subsection (i) surplusage. Simply put, if the statute permits an employer to present all of its evidence (including its "legitimate" reasons) at the contributing factor/*prima facie* stage, and if the statute requires an ALJ not only to weigh those assertedly legitimate reasons during the same phase but to use the same "preponderance" scale, there is no reason to have a second stage at all. If the ALJ finds that the employer's evidence outweighs the whistleblower's at the first stage, there is no need for a second phase as the employer already has won and whistleblower's claim has been found wanting. Indeed, if an employer prevails at the first phase, carrying out the second stage becomes a meaningless, wasteful exercise for all concerned. The same true holds true if the employer loses at the first stage. If an employer's evidence is found wanting at the first stage, where the scales are

level, it is inconceivable that the same evidence could succeed at the second stage, where the "clear and convincing" standard tilts the scales against the employer.

If there is no need for a second stage, there is no need for a second subsection. But this is not the way Congress wrote the statute. Reading it so that subsection (ii) is redundant violates one of the most fundamental canons of construction, the admonition against reading a statute so that any part is rendered worthless, unnecessary, or superfluous. Under this "most basic of interpretative canons, ... [a] statute should be construed so that effect is given to all of its provisions, so that no part will be inoperative or superfluous, void or insignificant." *Corley*, 556 U.S. at 314. As noted above, this canon "is strongest when," as here, "an interpretation would render superfluous another part of the same statutory scheme. *Marx, supra,* 133 S. Ct. at 1178.

V. THE ARB SHOULD REJECT THE RAILROADS' ARGUMENTS THAT SUBSECTION (II) SHOULD BE INTERPRETED OUT OF AIR-21 BECAUSE IT IS "UNFAIR" TO EMPLOYERS

The railroads argue that AIR-21 itself is actually fair because it is essentially no different that the *McDonnell Douglas* test—and that only an ostensibly misguided judicial interpretation, in their view exemplified by the *Fordham* majority opinion, could make AIR-21 "fundamentally unfair." Respondent's Supp. Briefing, at p. 1 (filed Dec. 17, 2014), in *Powers v. Union Pac. RR Co.*, ARB Case No. 13-034, ALJ Case No. 201 O-FRS-00030. *See id.* at 6, 12.

The ARB should not allow employers to beguile it into repeating the mistake the MSPB and the Federal Circuit made in *Clark v. Dept. of Army*, 997 F.2d 1466 (Fed. Cir. 1993), which effectively gutted the WPA through contorted and anti-contextual statutory interpretations.[25] Nor

[25] *Clark's* affirmance of the MSPB's own misinterpretation of the WPA (which had held that the WPA did not incorporate the *per se* knowledge/timing test) compelled Congress to amend the WPA next year, "explicitly [to] vitiate[ ] *Clark* ...." *Kewley v. Dep't of HHS*, 153 F.3d 1357, 1361-62 (Fed. Cir. 1998).

should the ARB be tempted to "interpret" AIR-21 so as to resurrect the *McDonnell Douglas* method by re-inserting the notion that an employee must rebut an employer's "pretext" as part of the employee's burden of proof at the *prima facie* stage. Such an interpretation would circumvent rather than fulfill Congress' intent. The ARB has no more warrant than an Article III court to "'second-guess'" Congress' wisdom or fairness or "'to sit as a super-Legislature.'" *Heller, supra,* 509 U.S. at 319 (citations omitted).

The following illustrates the poverty of the railroads' argument that they need relief from being treated unfairly. OSHA and the FRA report that the large majority of § 20109 complaints arise after an employee reports a job-related injury or requests medical assistance and is disciplined for causing his own injury, *i.e.,* for violating rail work safety rules.[26] Prior to passage of § 20109, a worker being retaliated against by the railroad for reporting his injury or requesting medical assistance could only hope for relief through the § 3 procedures of the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.* But as OSHA and the federal courts have discovered, the § 3 process is

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[26] OSHA and the FRA were disturbed that "63% of [the § 20109] complaints" received "[b]etween August 3, 2007, and March 31, 2012 ... involve[d] an allegation that a worker has been retaliated against for reporting an on-the-job injury." Letter of FRA and OSHA Administrators to Ass'n of American Railroads, at p. 2 (July 16, 2012) (avail. 073116 at http://www.brs.org/Whats_New/FRA-OSHA_Joint_Letter%20to%20RRs_(July_2012).pdf). Some § 20109 complaints stem from retaliation taken after an employee complains about the filing employee's complaint about unsafe working conditions but in the absence of an injury. The railroads defend against these complaints by arguing that the working conditions were safe, the employee has improper motives and/or complained in bad faith, and the complaints were false and conduct unbecoming to the railroad, in violation of work rules. Although the factual scenario and railroad rules differ, the same dynamics play out in the § 20109/AIR-21 process.

horribly unfair.[27] Congress, aware of § 3's deficiencies,[28] chose not to amend it but to supplant it through passage of § 20109, which created a system Congress judged fair enough to encourage employees to believe that they could prevail if they filed safety related complaints.

It is essential to understand how a § 20109 claim is actually pursued. After an employee files such a claim, he must show, by a bare preponderance of evidence, that: (1) he is a rail worker; (2) he reported being injured on the job; and (3) he suffered an adverse employment action in a time nexus connected to the reporting function. This is the *prima facie* case required under subsection (i) of AIR-21. As a matter of law, the proof of the *prima facie* case supplies the requisite discriminatory intent and sufficiently connects the dots to a finding that the protected act contributed to the adverse action. At the subsection (i) stage an employee does not have to prove or disprove the railroad's motive. *Marano,* 2 F.3d at 1140.

To be sure, AIR-21 subsection (i) allows a railroad to challenge, through direct evidence and cross-examination of the employee's witnesses, the evidence of the *prima facie* case. For example, it can try to rebut the employee's evidence that he was a rail worker, that the employer is a railroad, that he filed a safety related complaint, that he filed it with the correct people, and

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[27] *See In re Brandy Thompson v. Norfolk So. R. Co.*, Case No. 2011-FRS-00015 (1/8/13) ("When taken as a whole, the procedure leading to Complainant's suspension without pay for falsification of an injury was manifestly one-sided and failed to constitute a good faith effort to determine the objective merit of the charges"). Like *Norris v. Hawaiian Airlines*, 512 U.S. 246 (1994), when the real facts are developed, not suppressed in the unfair § 3 process, justice for the victimized worker may be realized. "The evidence shows that Respondent intentionally presented an extraordinary and fraudulent theory that it was not physically possible for Complainant to have sustained an injury in the manner he described." Sec'y's Finding, *Norfolk So .R. Corp./Kawa*/5-2700-10-010) (Aug. 23, 2012). *See Kulavic v. Chicago & Ill. M. Ry. Co.*, 1 F.3d 507 (7th Cir. 1993); *Coppinger v. Metro-North Comm'r RR*, 861 F.2d 3 (2nd Cir. 1988).

[28] Hearing on H. R. 706, the 1966 RLA amendments, before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 89th Cong. *Id.* at 335-36.

that the action taken was averse to him, But nothing in AIR-21 subsection (i) allows a railroad to nullify the evidence a whistleblower amassed in support of his *prima facie* case by suggesting that its adverse actions were motivated, justified, or excused in whole or in part by some other, non-discriminatory reason. Motive, justification, or excuse are relevant only to subsection (ii) of AIR-21's bifurcated test, where evidence of such is weighed according the much more daunting clear and convincing standard. Significantly, nothing in the text, history, or case-law surrounding either AIR-21 subsection suggests that a whistleblower has an obligation to anticipate, and address motive-related arguments as part of his *prima facie* case or to respond to such arguments at the subsection (i) *prima facie* stage.[29]

Why does a railroad care about whether its evidence can be used to attack the "contributing factor" aspect of a subsection (i) *prima facie* case? The answer demonstrates clearly the railroads' motive in making these arguments. Recall that the judicial methods rejected by Congress required a worker to carry the burden of proof of showing that an employer's proffered non-discriminatory rationale for the adverse employment action was a pretext. If a railroad can persuade the ARB to permit the ALJ to consider—during the AIR-21 subsection (i), *prima facie* phase of a case—evidence that these other reasons were the actual contributing factors (then the railroad will have succeeded in both shifting the burden to prove pretext back to the employee and having that evidence tested under a much lower standard of proof. The railroads' argument fails because flies

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[29] The railroads salivate over the potential of a return to the *McDonnell-Douglas/Burdine* where "the presumption of discrimination 'drops out of the picture' once the defendant meets its burden of production," *St. Mary's,* 509 U.S. at 511, [but] the trier of fact may still consider the evidence establishing the plaintiff's *prima facie* case "and inferences properly drawn therefrom ... on the issue of whether the defendant's explanation is pretextual," *Burdine*, 450 U.S. at 255, n. 10. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 143 (2000).

in the face of Congress' reasons for enacting the AIR-21 framework.

The dissent in *Powers v. Union Pacific RR Co.*, No. 13-034, 2015 WL 1881001, at *34 (ARB March 20, 2015), raised the question of what evidence should be considered when determining whether a plaintiff has satisfied the contributing factor element of his or her *prima facie* case under the AIR-21 burden-shifting framework.[30] Courts agree that, logically, "even if [the employee's workplace rule violation is] the primary and predominant basis for [the adverse action], this does not preclude the possibility that [his or her] injury report could still have been *a* contributing factor in his discharge ...." (emphasis in original). *Ray v. Union Pacific*, 971 F. Supp. 2d 869, 894 (S.D. Iowa 2013). Put differently, if a plaintiff can satisfy the contributing factor element of his or her *prima facie* case, even if the railroad's proffered justification for the adverse action is true, the railroad's proffered justification is not relevant.[31]

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[30] A "contributing factor" is "any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision." *Marano,* 2 F.3d at 1140.

[31] It is beyond dispute that whistleblowers can prove the contributing factor element of their *prima facie* cases by showing their protected activity was a necessary link in the chain of events leading to or was inextricably intertwined with the adverse action: "This cited [workplace rule violation] cannot be unwound from [the plaintiff's] decision to [engage in protected activity]. Even viewing this evidence in the light most favorable to BNSF, [the plaintiff] has met the low bar set by the "contributing factor" element of his prima facie case with respect to his decision to [engage in protected activity]." *Rookaird v. BNSF Ry. Co.*, No. 14-cv-176, 2015 WL 6626069, at *5 (W.D. Wash. Oct. 29, 2015); *see also Davis v. Union Pac. R.R. Co.*, No. 12-cv-2738, 2015 WL 5519115, at *3 (W.D. La. Sept. 17, 2015) ("[The plaintiff] argues that the injury report and his termination are not only temporally related but also inextricably intertwined, because without the injury report, there would have been no discipline. The Court agrees. ... [T]he facts of this case . . . collectively meet the broad definition of 'contributing factor' for purposes of the FRSA."); *Smith-Bunge v. Wisconsin Cent., Ltd.*, 60 F. Supp. 3d 1034, 1040-42 (D. Minn. 2014). The railroads' supposed non-retaliatory reasons for the adverse actions neither breaks the chain of events leading to nor unwinds the protected activity from the adverse action, meaning the question is again raised: If a plaintiff can prove the contributing factor element of his or her *prima facie* case by showing his protected activity was a necessary link in the chain of events leading to or was inextricably intertwined with his protected activity, and the railroads' proffered justifications neither break the chain of events leading to nor unwinds the protected activity from the adverse action, how can

CONCLUSION

Amici respectfully urge the ARB to reaffirm its decisions in *Powers* and *Fordham* and to provide explicit guidance to ALJs and the parties in every FRSA case that:

> 1. An employer's evidence related to 'contributing factor' may be introduced during the employee's *prima facie* case presentation only if and only to the extent that the employee introduced evidence to anticipatorily challenge the employer's claimed "other reasons" for taking the adverse action;
>
> 2. Otherwise, the employer may only introduce evidence of such "other" reasons during its step two affirmative defense presentation; and
>
> 3. Regardless of when the employer's evidence is introduced, it must be judged under the "clear and convincing standard"; it may never be measured with the benefit of the lower proof standard required of the employee.

Respectfully submitted on this 3rd day of August, 2016 by:

/s/ *Ned Miltenberg*

NED MILTENBERG
COUNSEL OF RECORD
NATIONAL LEGAL SCHOLARS LAW FIRM, P.C.
5410 Mohican Road — Suite 200
Bethesda, MD 20816-2162
202/656-4490
NedMiltenberg@gmail.com
COUNSEL FOR *AMICI* LAW PROFESSORS

HARRY W. ZANVILLE
HARRY W. ZANVILLE LAW OFFICE
10740 El Marbea Lane
La Mesa, CA 91941
619/400-7164
hwzlaw@gmail.com
COUNSEL FOR *AMICUS* BMWED

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such justification be relevant? To hold otherwise would effectively re-impose the same burden of proving discrimination *vel non* that Congress explicitly rejected. *See Marano*, 2 F.3d at 1140 ("[t]he legislative history . . . emphasizes that 'any' weight given to the protected [activity], either alone or even in combination with other factors, can satisfy the 'contributing factor' test").

CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that the foregoing Brief of Erwin Chemerinsky, Robert F. Williams, and the Brotherhood of Maintenance Way Employes—Division of the International Brotherhood of Teamsters, as *Amicus Curiae* in Support of the Complainant, has been filed with the Administrative Review Board through the U.S. Department of Labor's Electronic File and Service Request ("EFSR") system.

The undersigned also hereby certifies that true and correct hard/paper copies of the foregoing Brief of Erwin Cherminsky, Robert F. Williams, and the Brotherhood of Maintenance Way Employes—Division of the International Brotherhood of Teamsters, as *Amicus Curiae* in Support of the Complainant, have been served on this 3rd day of August, 2016, by First-Class U.S. Mail, postage prepaid, upon the following:

F. Tucker Burge, Esq.
Burge and Burge
2001 Park Place North,
Suite 850
Birmingham, AL 35203
Counsel for Complainant Kenneth Palmer

and

George H. Ritter, Esq.
Jennifer H. Scott, Esq.
Wise Carter Child & Caraway, PA
P.O. Box 651
Jackson, MS 39205
Counsel for Respondent Canadian National Railway/Illinois Central Railroad Co.

/s/ Ned Miltenberg
Ned Miltenberg

APPENDICES

APPENDIX A — DETAILED INFORMATION ON IDENTITY AND INTERESTS OF LAW PROFESSOR *AMICI*

ERWIN CHEMERINSKY is the Dean, Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law. He founded the Law School in 2008. He is a graduate of the Harvard Law School, J.D., *cum laude*, and Northwestern University, B.A. with Highest Distinction. Before coming to the University of California, Irvine, Chemerinsky was Alston & Bird Professor of Law and Political Science, Duke University (2004-08). Before that, Dean Chemerinsky taught for 21 years at the University of Southern California School of Law, where he also served for four years as director of the Center for Communications Law and Policy. He previously practiced as a trial attorney with the U.S. Department of Justice in Washington, D.C., as well as an attorney in private practice in that city.

He is the author of seven treatises, casebooks, or other books, including CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES (5th ed. 2015) (a one-volume treatise); THE CASE AGAINST THE SUPREME COURT (2014); CONSTITUTIONAL LAW (4th ed. 2013) (a casebook); FEDERAL JURISDICTION (6th ed. 2012); CRIMINAL PROCEDURE (2d ed. 2013); THE CONSERVATIVE ASSAULT ON THE CONSTITUTION (2010); and ENHANCING GOVERNMENT (2008). He also is the author of 25 book chapters, more than 200 law review articles (published in such journals as the HARVARD LAW REVIEW, MICHIGAN LAW REVIEW, NORTHWESTERN LAW REVIEW, UNIVERSITY OF PENNSYLVANIA LAW REVIEW, STANFORD LAW REVIEW, and YALE LAW JOURNAL), and several hundred other articles, including a monthly column in the ABA JOURNAL.

Los Angeles voters elected him to chair the Commission to draft a new City Chair and the ABA selected him to help draft the Constitution of the Republic of Belarus. In January 2014, NATIONAL JURIST magazine named Dean Chemerinsky as the "most influential person in legal education" in the United States.

Dean Chemerinsky's research, teaching, writing, and advocacy focus on Constitutional Law; Administrative Law; Civil Procedure; Federal Jurisdiction; Law and the Mass Media; Ethics; and Professional Responsibility. Additional information about Dean Chemerinsky, including his full Curriculum Vitae, can be found at his University of California, Irvine School of Law website—http://www.law.uci.edu/faculty/full-time/chemerinsky/chemerinskyCV.pdf

ROBERT F. WILLIAMS is a Distinguished University Professor of Law at Rutgers Law School–Camden. He is a graduate of Columbia University Law School, LL.M; New York University Law School, LL.M; Univ. of Florida, J.D. with honors; Florida State University, B.A., *cum laude*.

He is the author of THE LAW OF AMERICAN STATE CONSTITUTIONS (2009), STATE CONSTITUTIONAL LAW (4th ed. 2006), co-author of LEGISLATIVE LAW AND STATUTORY INTERPRETATION (co-author; 4th ed. 2008), and the author or co- author of two other books and 100 book chapters and law review articles, including ones published in the TEXAS LAW REVIEW, JOURNAL OF LEGAL STUDIES, HASTINGS CONSTITUTIONAL LAW QUARTERLY, GEORGE WASHINGTON UNIVERSITY LAW REVIEW, WILLIAM & MARY LAW REVIEW, RUTGERS LAW JOURNAL, BOSTON COLLEGE LAW REVIEW, FLORIDA LAW REVIEW, GEORGIA LAW REVIEW, JOURNAL OF LEGAL EDUCATION, LOUISIANA LAW REVIEW, MISSISSIPPI LAW JOURNAL, NYU'S

ANNUAL SURVEY OF AMERICAN LAW, NOTRE DAME LAW REVIEW, PENN STATE LAW REVIEW, and THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE.

Professor Williams' research and teaching focus on Statutory Interpretation & Legislation, State Constitutional Law, Constitutional Law, and Civil Procedure. Additional information about Professor Williams can be found at the Rutgers Law School website http://camlaw.rutgers.edu/directory/968/

APPENDIX B

A chronological list of anti-retaliation statutes demonstrating consistently heightened employer's burden of proof:

Abbreviated name of the statute	Regulated Sector	Date originally enacted	Date amended	"*the* motivating factor"	Merely "*a* contributing factor"
OSH 11(c)	Private & USPS	1970		x	
FWPCA	water pollution	1972		x	
SDWA	water systems	1974		x	
TSCA	toxics	1976		x	
SWDA	solid waste	1976		x	
ISCA	ocean containers	1977		x	
CAA	air pollution	1977		x	
CERCLA	pollution spills	1980		x	
AHERA	school asbestos	1986		x	
WPA	federal employees	1978		x	
WPA	federal employees		**1989**		*X*
AIR 21	air safety	2000			*X*
SOX	securities	2002			*X*
PSIA	pipeline	2002			*X*
ERA	nuclear	1974		x	
ERA	nuclear		**2005**		*X*
STAA	truckers	1982		x	
STAA	truckers		**2007**		*X*
FRSA	railroad	2007			*X*
NTSSA	transit	2007			*X*
CPSIA	consumer	2008			*X*
ACA	health care	2010			*X*
SPA	seamen	2010			*X*
CFPA	Dodd-Frank	2010			*X*
FSMA	food safety	2011			*X*
MAP-21	auto manufacturers	2012			*X*